

**STATE OF SOUTH CAROLINA  
BEFORE THE PUBLIC SERVICE COMMISSION**

**DOCKET NOS. 2019-185-E and 2019-186-E**

South Carolina Energy Freedom Act	)	
(H.3659) Proceeding to Establish Duke	)	
Energy Carolinas, LLC's and Duke Energy	)	<b><u>RESPONSE IN OPPOSITION TO</u></b>
Progress LLC's Standard Offer Avoided	)	<b><u>THE PETITION OF DUKE ENERGY</u></b>
Cost Methodologies, Form Contract Power	)	<b><u>CAROLINAS, LLC AND DUKE</u></b>
Purchase Agreements, Commitment to Sell	)	<b><u>ENERGY PROGRESS, LLC FOR</u></b>
Forms, and Any Other Terms or	)	<b><u>RECONSIDERATION OF ORDER</u></b>
Conditions Necessary (Includes Small	)	<b><u>NO. 2019-881(A)</u></b>
Power Producers as Defined in 16 United	)	
States Code 796, as Amended) – S.C. Code	)	
Ann. Section 58-41-20(A)	)	

This matter comes before the Public Service Commission of South Carolina (“Commission”) pursuant to Duke Energy Carolinas, LLC’s (“DEC”) and Duke Energy Progress LLC’s (“DEP”) (DEC and DEP, collectively, the “Petitioners” or “Duke”) Petition for Reconsideration of Order No. 2019-881(A) (the “Petition”), filed in the above-referenced dockets on January 13, 2020. The Petition seeks to strike portions of the Report of the Independent Third-Party Consultant (“Report” or “Power Advisory Report”) issued by Power Advisory LLC (“Power Advisory”) and a discrepancy in the avoided capacity rate for DEC. For the reasons set forth below, Johnson Development Associates, Inc. (“JDA”) and South Carolina Solar Business Alliance, Inc. (“SCSBA”) (JDA and SBA, collectively, the “Respondents” or “Intervenors”) respond in opposition to the Petition and respectfully request that the Petition be denied.

**I. BACKGROUND**

The Commission issued its amended Order in this docket on January 2, 2020 (Order No. 2019-881(A)). Duke filed its Petition for Reconsideration on January 13, 2020. In its Petition, Duke

requests that the Commission strike Sections 4.1.1, 4.1.3, 4.4.1, and 4.4.2 of the Power Advisory Report and modify the Order so as not to rely upon any of these provisions.<sup>1</sup>

Duke's fundamental objection to the Power Advisory Report is that the consultant discusses publicly-available information relating to the issues of contract length and LEO formation that was not presented by the parties. Petition at 4. Duke characterizes this evidence as the results of "independent investigation." But to be clear, all the information Duke objects to consists of publicly-available documents that would be the proper subject of judicial notice. Specifically, the information Duke objects to consists of:

- A press release establishing that Georgia Power contracted for 510 MWs of solar in Georgia with an average price of \$36/MWh for 30-year contracts;
- A graph generated by Power Advisory, illustrating PPA price vs. contract length in Georgia Power and CPRE Tranche 1;
- A news article cited for the uncontroversial facts (amply demonstrated by testimony in the case) that: (1) "It is hard to forecast the avoided cost of a given utility to understand what the pricing will be 10 years from now"; and (2) "There is regulatory risk in terms of whether there will still be a utility purchase obligation 10 years from now";
- A table illustrating PURPA contract lengths in various jurisdictions;
- The publicly-available tariff of a single utility in Washington State; and
- Recent rulings by utilities commissions in Washington State and Oregon.

Although the cited sections of the Report focus overwhelmingly on the parties' evidence and testimony, and discuss this material only briefly, Duke nevertheless requests that the Commission strike those sections in their entirety.

Duke argues that Power Advisory's discussion of this information in its Report violates the South Carolina Administrative Procedures Act, the Commission's rules of practice and procedure,

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<sup>1</sup> Intervenors do not specifically address the arguments in Duke's Petition as they relate to the DEC avoided capacity rate. However, **Duke's request for relief on this issue is inconsistent with the relief requested by Intervenors in their own petition for reconsideration, and should be denied for that reason.**

and the *ex parte* prohibitions of S.C. Code Ann. § 58-3-260; and also constituted “a violation of procedural due process.” *Id.* at 4-6.

Somewhat perplexingly, the Petition does not say how Power Advisory’s reliance on this information contributed to any error in the Commission’s Findings of Fact or Conclusions of Law. It seems only that Duke would prefer that Power Advisory’s informed expert analysis of these issues be expunged from the record of this case, lest it remain in the public record.

## II. STANDARD OF REVIEW

The Commission’s review of the Petition is governed by S.C. Code Ann. Reg. 103-825(4), which requires the Petition to:

set forth clearly and concisely:

- (a) The factual and legal issues forming the basis for the petition;
- (b) The alleged error or errors in the Commission order;
- (c) The statutory provision or other authority upon which the petition is based.

“Conclusory statements and non-specific allegations of error do not satisfy the requirements of the rule. *Friends of the Earth and Sierra Club*, Docket No. 2017-207-E, Order No. 2019-122 at pg. 3. Accordingly, the burden to reverse a Commission order is very high, and error based on the law or facts must be found.

## III. ARGUMENT

### A. Duke’s “Petition for Reconsideration” is in reality an untimely and procedurally improper motion to strike.

Duke asks that the Commission strike Sections 4.1.1, 4.1.3, 4.4.1, and 4.4.2 of the Power Advisory Report. Petition at 2. But Duke did not make a timely motion to strike any portion of the Report prior to the Commission’s Order, and Order No. 2019-881(A) does not address any such motion. Duke’s motion to strike is not premised on any legal or factual error in the

Commission's Order and is therefore not the proper subject of a motion for reconsideration under the Commission's Rules.

**B. Duke's Due Process concerns are unfounded because Duke has already had ample opportunity to respond to the Power Advisory Report.**

Duke asserts that "The inclusion in the Power Advisory Report of information that was not properly part of the record was a violation of procedural due process" under Article I, Section 22 of the South Carolina Constitution. That Article provides, in relevant part, that "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard[.]" Duke's argument is without merit.

In the first instance, the mere inclusion in the Report of information that had not previously been presented by the parties does not constitute a "binding judicial or quasi-judicial decision," and is therefore not within the scope of Article I Section 22. But more importantly, the Commission's reliance on that information does not offend due process because Duke had ample notice and opportunity to be heard.

Power Advisory filed its report in the docket of this case on November 1, 2019. Pursuant to the procedural orders issued by the Commission, Duke filed a 33-page response to the Report on November 8, 2019. In that filing the Company provided substantive responses to many of the observations and conclusions in the Report, including the Sections at issue here. Duke also addressed the Power Advisory Report in its Proposed Order. And the Commission considered those filings in issuing its Order. Those provided Duke ample opportunity to rebut or contextualize Power Advisory's discussion and conclusions, including the publicly-available information cited by Power Advisory in its Report. Duke has therefore had "notice, an opportunity to be heard in a

meaningful way and judicial review,” fully satisfying its due process rights. *Kurschner v. City of Camden Planning Comm’n*, 376 S.C. 165, 171, 656, S.E.2d 346, 350 (2008).

**C. Duke’s statutory objections to consideration of the Power Advisory Report are unfounded.**

Duke hurls several statutory and regulatory objections to the Power Advisory Report in its Petition, none of which hits home. First, Duke claims that the Report constitutes an *ex parte* communication subject to S.C. Code Ann. § 58-3-260, and that it therefore may not be used to “furnish, augment, diminish, or modify the evidence in the record.” Petition at 3. But under the *ex parte* statute, an *ex parte* communication is one lacking “notice and opportunity for all parties to participate in the communication.” S.C. Code Ann. 58-3-260(B). As discussed above, Power Advisory filed its Report in the dockets, and all parties had notice and the opportunity to respond. This objection therefore falls flat.

Duke also claims that the Report violated the Administrative Procedures Act (S.C. Code Ann. § 1-23-330) and the Commission’s rules of practice and procedure (S.C. Code Regs. Ann. § 103-845 and 103-849). But what these provisions establish is simply that the rules of evidence apply, and that parties may lodge objections to evidence (S.C. Code Ann. § 1-23-330(1), S.C. Code Regs. § 103-849); that any party may conduct cross-examination (S.C. Code Ann. § 1-23-330(3)); and that *witness* testimony shall be prefiled (S.C. Code Regs. Ann. § 103-845). None of these requirements is offended by the Power Advisory Report. And these provisions certainly do not support Duke’s claim that it should have had the opportunity to conduct discovery or cross-examination of Power Advisory – a claim that seems to have nothing to do with whether Power Advisory relied on publicly-available information not introduced by the parties, and is certainly inconsistent with the intent of Act 62.

Furthermore, the cited sections also establish that “notice may be taken of judicially cognizable facts,” as well as “generally recognized technical or scientific facts within the agency's specialized knowledge,” and that “The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence[.]” S.C. Code Ann § 1-23-330(4). Even if Act 62 did not already provide ample justification for the Commission to rely on Power Advisory’s independently-derived conclusions, this alone would be sufficient to allow consideration of the full Report.

**D. Granting the Petition Would Offend Both the Plain Language of Act 62 and the Legislative Intent Behind S.C. Code Ann. § 58-41-20(I).**

Duke selectively cites S.C. Code Ann. § 58-41-20(I) in claiming that Act 62 only allows Power Advisory to issue a report where “[a]ny conclusions based on the evidence in the record and included in the report are intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility.” Petition at pg. 3 (citing S.C. Code Ann. § 58-41-20(I) (emphasis supplied)). Unfortunately, Petitioners fail to cite other relevant portions of that section, which defeat the cherry-picked interpretation which Duke puts forth. With respect to the function and duties of the consultant, S.C. Code Ann. § 58-41-20(I) reads as follows:

The commission is authorized to employ, through contract or otherwise, third-party consultants and experts in carrying out its duties under this section, including, but not limited to, evaluating avoided cost rates, methodologies, terms, calculations, and conditions under this section. ... **The commission shall engage, for each utility, a qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to this section.** The qualified independent third party is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties. The qualified independent third party shall submit all requests for documents and information necessary to their analysis under the authority of the commission and the commission shall have full authority to compel response to the requests. The qualified independent third party's duty will be to the commission. Any conclusions based on the evidence in the record and included in the report are

intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility. ... Any party to this proceeding shall be able to review the report including the confidential portions of the report upon entering into an appropriate confidentiality agreement....

The conclusions which must be included in the Report must contain the expert's "independently derived conclusions". *Id.* As with any expert, Power Advisory was expected to bring its independently-derived knowledge and expertise to bear on the issues.<sup>2</sup> The Report does just that. The Report is then to be used as evidence along with all other evidence in the record to allow the Commission to inform its ultimate decision. *Id.* The Commission has the flexibility to give weight to the conclusions as it sees fit. A more complete reading of S.C. Code Ann. § 58-41-20(I) shows that Duke's Petition is without merit.

#### IV. CONCLUSION

For the foregoing reasons, Duke has failed to provide any justification for Reconsideration of the Commission's Order or for Striking and section of the Power Advisory Report. The Petition should therefore be denied.

Respectfully submitted, this 22nd day of January, 2020.

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<sup>2</sup> Again, this is consistent with the Administrative Procedures Act, which provides that an agency may take notice of "generally recognized technical or scientific facts within the agency's specialized knowledge," as well as the "agency's experience, technical competence and specialized knowledge."

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